Editor's note: Reconsideration granted; previous decision modified -- Order dated Sept. 26, 1988, found at 103 IBLA 186 through D, below.

STORM MASTER OWNERS ET AL.

IBLA 88-91 Decided July 21, 1988

Appeals from a decision of the Area Manager, Indio Resource Area Office, California, Bureau of Land Management, requiring removal of wind turbine generators from wind park right-of-way. CA-13198.

Appeals dismissed in part; decision vacated and case remanded.

1. Administrative Procedure: Standing -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Generally -- Rules of Practice: Appeals: Standing to Appeal

   Where BLM has approved the assignment of a wind park right-of-way subject to execution of new authorized user agreements with existing authorized users who have the right to use sites within the right-of-way for construction of wind turbine generators, such users have standing to appeal from a subsequent BLM decision issued to the right-of-way holder ordering removal of all generators on the right-of-way.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Conditions and Limitations

   A decision by BLM ordering the holder of a wind park right-of-way to remove or have removed from the right-of-way all wind turbine generators on the basis that none of the retrofit report proposals submitted met the criteria of positive feasibility for long-term productivity will be vacated where the evidence relied upon by BLM does not support the action taken.

APPEARANCES: Andrew C. Laubach, Esq., and Bruce A. Webster, Esq., Los Angeles, California, for appellant, Storm Master Owners; Michael J. Kurman, Esq., David Tillotson, Esq., and Richard N. Gale, Esq., Washington, D.C., for appellant, Windshark Owners Association; Miles L. Kavaller, Esq., pro se; John A. McKinney and Clyde A. Randolph, pro sese; Harlee M. Gasmer, Esq., and Brian H. Kay, Esq., Beverly Hills, California, and Marc P. Schoonmaker, President, Vieren Group, Inc., Flintridge, California, for the VieRam Trust; Lynn M. Cox, Esq., and William M. Wirtz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Storm Master Owners, Windshark Owners Association, Miles L. Kavaller, John A. McKinney, and Clyde A. Randolph have appealed from a decision of the Area Manager, Indio Resource Area Office, California, Bureau of Land Management (BLM), dated October 6, 1987, requiring the removal of all wind turbine generators (WTG) from the right-of-way for the Cabazon Wind Park, CA-13198, situated on approximately 200 acres of land in the N 1/2 and the N 1/2 N 1/2 NE 1/4 SE 1/4 sec. 18, T. 3 S., R. 3 E., San Bernardino Meridian, Riverside County, California, within the Cabazon Valley near Palm Springs, California. The Cabazon Wind Park is part of the San Gorgonio Pass Wind Energy Project.

Factual Background

The current right-of-way for the Cabazon Wind Park was originally issued to the Aztec Energy Corporation (Aztec Energy) by the District Manager, California Desert District, BLM, on December 8, 1982, pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), for an initial term of 20 years and "so long thereafter as wind energy is produced or utilized in commercial quantities," but in no event more than 10 years (Right-of-Way Grant at 2). 1/ Under the grant, Aztec Energy received a "possessory, nonexclusive right" to use the Federal lands for the construction, operation, and maintenance of WTG's, transmission lines, associated structures and access roads, and the exclusive right to develop, produce, utilize, and sell wind energy resources. Id. at 1. With the written consent of BLM, Aztec Energy was permitted to "assign in whole or in part any right, title, or interest" in the right-of-way grant. Id. at 7. Attached to the right-of-way grant was a November 10, 1982, plan of operations, which stated that the wind park would consist of 188 Windcycle WTG's manufactured by Trans Power Manufacturing, Inc., of Salt Lake City, Utah (Trans Power), transmission lines, a substation, and access roads and briefly described the extent and nature of planned operations. However, the grant required Aztec Energy to submit a "comprehensive Construction, Operations, and Maintenance Plan" for BLM approval within 12 months of the effective date of the grant and 30 days prior to construction. Id. at 14. This plan, along with any notice to proceed and stipulations placed upon the plan, was specifically incorporated in the right-of-way grant. Id. at 3. In addition, the grant required that Aztec Energy "diligently proceed with development of the wind energy resource * * * in accordance with the schedule contained as part of the Construction, Operations, and Maintenance plan

1/ At the time of issuance of the right-of-way grant, Aztec Energy had already entered into a "Wind Park Power Purchase and Sales Agreement" on Nov. 19, 1982, with the Southern California Edison Company (SCE) for the sale of energy generated at the Cabazon Wind Park. The record indicates that SCE purchased under the agreement energy produced between Nov. 29, 1983, and May 1, 1984, between Oct. 30, 1984, and Nov. 22, 1985, and between Jan. 2 and 31, 1986; that power to the WTG's at the windpark was shut off on May 27, 1986, by SCE because of nonpayment of financial obligations; and that the electrical substation was subsequently damaged by an earthquake on July 8, 1986.

approved by [BLM]." Id. at 4. In the case of failure "to develop the wind resource within the prescribed time or to prosecute diligently construction of the number of turbines as provided in the plan," the grant provided that "the Grantor may cancel this grant." Id. The grant generally provided that "[f]ailure of the Grantee to comply with any provision of this grant * * * shall constitute grounds for suspension or termination of this grant." 2/ Id. at 9. The grant further provided that:

> In the case of non-compliance by the Grantee, with the terms and conditions of this right-of-way grant, the Grantee will be required to comply within 30 days of the notice of non-compliance. The Grantor will have the option at the end of the 30 days to terminate this right-of-way grant.

Id. at 3. The right-of-way grant also provided that, upon termination of the grant, the grantee would have 6 months to remove all structures, equipment, and materials and that, after the 6-month period or any extension thereof, they would become the property of the United States. Concurrent with issuance of the right-of-way grant, BLM issued a notice to proceed to Aztec Energy on December 8, 1982. On September 13, 1983, and December 6, 1983, BLM amended the plan of operations to provide for the construction of 204 Storm Master WTG's manufactured by Wind Power Systems, Inc., of San Diego, California (Wind Power), 40 Dynergy WTG's manufactured by Dynergy Systems Corporation of Banning, California (Dynergy Systems), and 9 Wenco WTG's, manufactured by WENCO S.A. of Switzerland (WENCO), in place of 158 Windcycle WTG's and to require Aztec Energy to complete construction of the remaining 30 Windcycle WTG's or remove existing structures, and foundations and reclaim the sites no later than June 30, 1984.

Thereafter, Aztec Energy apparently into various agreements with investors to sublease certain WTG sites. Also, disputes arose with respect to these sublease agreements, and with assignment of the right-of-way itself. 3/ However, on July 6, 1984, the Indio Resource Area Office received a June 29, 1984, letter signed by representatives of Aztec Energy,

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2/ The grant also specifically provided that the authorized officer could, in the event of noncompliance with the terms and conditions of the grant during construction, halt construction "until the Grantee complies" (Right-of-Way at 13).

3/ The record indicates that Dynergy Systems and Transworld Wind Corporation (Transworld), a developer and operator of wind parks, the two subsidiaries of International Dynergy, Inc., (IDI) claimed in a Mar. 19, 1984, letter, received by the Indio Resource Area Office on Mar. 22, 1984, that they had entered into an agreement with Aztec Energy for the purchase of the windpark right-of-way. Along with a Mar. 15, 1984, letter, received on that date, Dynergy Systems provided BLM with a sample "investor document" regarding the siting and operation of "Dynergy 'American Windshark'" WTG's on the Cabazon Wind Park, a sample "Site Sublease Agreement" under which Transworld subleased for an initial term of 30 years the right to construct, operate, and maintain a WTG on a site within the Cabazon Wind Park and associated sample agreements.

IDI, and Trans Power, which set forth an agreement between the signatories thereto and requested the Area Manager to execute the agreement upon her acceptance. The agreement contained in the record is signed by the Area Manager. One agreement was apparently intended to respond to BLM concerns regarding the status of sublessees, including Trans Power, under the right-of-way grant, to ensure compliance with the deadline for construction of Windcycle WTG's, and to resolve a dispute regarding assignment of the right-of-way by Aztec Energy. Under the agreement, Aztec Energy agreed that, on or before September 30, 1984, it would bring all of its "site agreements" with WTG owners "into compliance with the terms of the Grant" by adding an addendum to each agreement which acknowledged that the owner was not a party to the right-of-way grant but had a license to use the land for siting a WTG. Also, the agreement provided that BLM would extend until September 30, 1984, the deadline for making Windcycle WTG's operational or removing them from and reclaiming the sites. Finally, the agreement stated that Aztec Energy "may apply for transfer of a portion of the Grant [to IDI]."

On September 7, 1984, the Indio Resource Area Office received requests by Aztec Energy and Transworld to transfer right-of-way CA-13198 from Aztec Energy to Transworld. 4/ The District Manager approved the assignment of the right-of-way to Transworld by decision dated October 15, 1984, stating that Transworld was "bound to all terms and conditions of the subject right-of-way grant dated December 8, 1982, and as amended on December 6, 1983." However, in approving assignment of the right-of-way, the District Manager amended the diligent development clause adopted on December 6, 1983, to require that Transworld complete construction of 20 Windcycle WTG's or remove all structures and foundations and reclaim the sites no later than April 30, 1985. On November 29, 1984, the District Manager issued a notice to proceed with development of the Cabazon Wind Park "as described in the Plan of Operation."

By letter dated February 28, 1985, the District Manager reminded Transworld of the April 30, 1985, deadline regarding the 20 Windcycle WTG's. By letter dated September 18, 1985, the Area Manager informed Transworld that its operations were not in compliance with the existing plan of operations and/or the right-of-way grant. The Area Manager stated that BLM would not process an amended plan of operations filed by Transworld on September 9, 1985, until Transworld took certain actions, including removal of the Windcycle WTG's and reclamation of the sites and completion of construction of the Storm Master WTG's. On October 16, 1985, IDI responded to the Area Manager's September 1985 letter, stating that the Windcycle WTG's would be

4/ On Sept. 17, 1984, Lantson E. Eldred, an attorney for Transworld and Dynergy Systems, filed a sample user agreement with the Indio Resource Area Office on behalf of Transworld, which agreement authorized the use of sites within the Cabazon Wind Park right-of-way, and requested the Area Manager to approve in writing the agreement and to indicate whether such approval "will be deemed sufficient written approval [of] all Authorized User Agreements of this format entered into between Transworld Wind Corporation and the various park users." Eldred stated that he would obtain signatures from "all existing users' on copies of the agreement.

removed by October 15, 1985, and that 14 Storm Master WTG's were operational and the remainder would be "retrofitted and on-line in the near future." 5/

On November 25, 1985, the Area Manager issued a notice to proceed to Transworld, thereby authorizing Transworld to begin development in accordance with a revised plan of operations submitted on November 19, 1985. 6/

By decision dated January 13, 1986, the Area Manager notified Transworld that it was not in compliance with certain terms and conditions of the right-of-way grant, including the failure to complete removal of the Windcycle WTG's. The Area Manager required Transworld to comply or show cause why the right-of-way grant should not be terminated within 30 days from receipt of the decision. No response appears of record. By order dated April 3, 1986, the Area Manager required Transworld to stop all work authorized in notices to proceed issued November 29, 1984, and November 25, 1985. This order was based on 19 "reasons," including the failure to complete removal of the Windcycle WTG's, and the failure to produce electricity as required in the November 25, 1985, notice to proceed.

By decision dated December 4, 1986, the District Manager notified Transworld that it had failed to correct eight of the items of noncompliance cited in the Area Manager's April 1986 stop work order and that there were three additional items of noncompliance, including the fact that SCE had disconnected the substation so that "even if the wind park were in full compliance, no electricity could be sold." Generally citing the diligent development clause of the right-of-way grant, the District Manager, based on Transworld's "continued noncompliance" with the terms of the right-of-way grant and pursuant to 43 CFR 2803.4(d), required Transworld to show cause why the grant should not be terminated, within 30 days of receipt of the decision. 7/

5/ Attached to IDI's response was a Sept. 23, 1985, notice from Edmund L. Salter, Chairman of Wind Power, directed to "All Cabazon STORM MASTER Owners," in which he indicated that, while Wind Power had been dissolved, the San Diego Technology Group, Inc., (SDTG) stood ready to "perform service work and routine preventative maintenance" on any WTG located in the Cabazon Wind Park.

6/ The notice to proceed was subject to a stipulation that the wind park "produce the minimum amount of acceptable energy expected for the windpark based on its current state of development," failing which the authorized officer "may take steps to require the Holder to remove the wind turbine generators that are keeping the windpark from producing the minimum amount of energy."

7/ In a newsletter published by SDTG, dated Jan. 26, 1987, it was reported that the Area Manager had, subsequent to issuance of the District Manager's December 1986 decision, spoken at the organizational meeting of the Windshark Owners Association on Dec. 16, 1986, and had made it clear that BLM's position was to "get Dynergy to assign the Right-of-Way Grant to a substantial tenant which met with BLM's approval * * * and propose a program whereby all inoperative turbines be retrofitted and returned to operational status, or get out and make way for a new tenant."

On January 15, 1987, IDI responded to the District Manager's December 1986 decision, stating that Transworld had "consented to the transfer of the Right-of-Way Grant to a responsible trust with the financial capability to assure the successful continued development and operation of the windpark" and specifically describing how the 11 items of noncompliance would be remedied. In particular, IDI stated that rehabilitation of disturbed sites would be undertaken upon completion of the construction plan under a schedule which would be coordinated with BLM and that the substation would be reconnected "prior to June 30, 1987." IDI also stated: "Attachment A * * * describes the test retrofit and construction schedule for the Windsharks." "Attachment A" to IDI's response was a letter prepared by the Vieren Group, Inc. (Vieren) and "accepted and agreed to" on January 12, 1987, by representatives of IDI, Transworld, Dynergy Systems, and the Guy Neil Ramsey Company (Ramsey). In accordance with the agreement set forth in the letter (hereinafter referred to as the January 1987 Agreement), Transworld was to transfer right-of-way grant CA-13198 to a trust to be created by Vieren and Ramsey. Ramsey was identified as owner of the wind park substation. In addition, section 7 of the agreement provided that:

> The Trust shall enter into * * * Authorized User Agreements with all of the Current Users, [8/] with the terms and conditions as set forth in Section 6b. above, [9/] and provided that as an additional condition thereto, all of the Current Users will be required to further agree as follows:
>
> a. That all of the Current Users will use their due diligence to develop their sites by repairing and making operational their WTG's, even on a temporary basis, in a timely fashion;

8/ "Current Users" were defined in the January 1987 Agreement, at page 2, as all "parties who, as of 31 December 1986, were parties to Authorized User Agreements * * * with [Transworld]."

9/ "Section 6b" provided that collateral would be posted with BLM by Vieren and Ramsey no later then Feb. 13, 1987, and applied to current users who had erected or contracted for the erection of Windshark, Storm Master and/or Wenco WTG's "provided that each Current User by such date has agreed to execute with the Trust a new Authorized User Agreement (with respect to the Right-of-Way Grant) setting forth:

"(1) That failure to meet any of the time and performance milestones set forth in Section 7 below, will result in (a) termination of that Current User's new Authorized User Agreement, (b) forfeiture of all of that Current User's right, and interest in and to the use of the site in question, and (c) immediate removal of that Current User's property from the site; and

"(2) That the Ground Rent of 2% plus proportionate share of cost of maintenance, repair of Windpark infrastructure, insurance and personal property taxes, as well as Substation Rent of 3%, both percentages of Gross Revenues, shall be included in the new Authorized User Agreement, but that no fees for either Maintenance or Management will be included nor will any responsibility for Maintenance or Management be assumed by the Trust." (January 1987 Agreement at 3).

b. That all of the Current Users will participate in a test and repair program with the following time and performance milestones for which time is of the essence:

(1) By 30 April 1987, a minimum of one (1) test machine for each new type of WTG, or new or substantial retrofit of WTG's, will have been erected with modifications installed and the test WTG's operational;

(2) By 30 June 1987, a formal test report shall have been completed for each test machine setting forth a positive feasibility for a repair and modification program with copies delivered to the Trust;

(3) By 31 July 1987, all bids shall have been received from contractors for a comprehensive repair and modification program for each type of WTG with copies to the Trust for review and approval, which approval shall not be unreasonably withheld; and

(4) By 30 September 1987:

(a) All contracts shall have been signed and all necessary approvals shall have been obtained from the BLM;

(b) Placement shall have been made in an escrow acceptable to the BLM and the Trust of either an irrevocable, unconditional and firm financing commitment by a financial institution authorized to do business in California, in an amount equal to the contracted repairs and modifications for all Current Users' WTG's, or a Letter of Credit or Certificates of Deposit from such institution(s) in the same aggregate amount or cash in the same aggregate amount;

(c) Demonstration that a test machine for each type WTG is capable of delivering power output for 30 consecutive days equal to at least 75% of the power output measured against the Design Power Curve utilizing the wind regime as existed during the 30 consecutive days; and

(d) An amount equal to the then value of the bond or collateral for the site which was previously posted with the BLM for the site by Vieren and Ramsey shall have been paid to Vieren and Ramsey to purchase such bond or collateral.

(January 1987 Agreement at 3-4). These provisions of the January 1987 Agreement will hereinafter be referred to collectively as the retrofit program requirements. In the event that a test report indicated a negative feasibility for repair and modification of a particular type WTG, section 7(c) of the agreement provided that

the Current Users of that type WTG by 30 September 1987, shall have either:

> (1) Removed each WTG of that type which has not met the performance criteria set forth in Section 7b(4)(c) hereof; contracted, with the approval of the BLM and the Trust, for the erection of a new WTG; and paid to Vieren and Ramsey an amount equal to the then value of the bond or collateral for the site which was previously posted with the BLM for the site by Vieren and Ramsey; or
>
> (2) Offered to the Trust the right to purchase the use of the site or sites * * *."

Id. at 4.

By declaration of trust dated January 14, 1987, Vieren and Ramsey created the VieRam Trust (VieRam). On that date, BLM received a request to transfer right-of-way CA-13198 from Transworld to VieRam. By decision dated January 15, 1987, the Acting District Manager approved the assignment of the right-of-way to VieRam, stating that the "assignee agrees to be bound by the terms and conditions of right-of-way CA-13198 as well as the compliance, rehabilitation, and construction schedule attached hereto as Exhibit A." "Exhibit A" was the January 13, 1987, letter from IDI to the District Manager, responding to his December 1986 decision, and the attached January 1987 Agreement. In addition, the Acting District Manager stated that "[a]ny and all existing Authorized User Agreements issued by Transworld Wind Corporation shall be assigned to, or be renegotiated by VieRam Trust."

On April 20, 1987, the Indio Resource Area Office received a copy of an April 15, 1987, letter from Vieren, as authorized agent for the VieRam Trust, addressed to WTG owners at the Cabazon Wind Park (hereinafter referred to as the April 1987 letter). In an April 16, 1987, cover letter, Vieren stated that the April 1987 letter had been sent to "present occupants of sites at Cabazon." In the April 1987 letter, at page 1, Vieren stated that, as a condition to assignment of right-of-way grant CA-13198, the

> new Grant Holder was required to agree not only to correct the specific deficiencies existing under the prior grant, but also to meet a definite time schedule for the development of the balance of the Wind Park, and for either restoration of existing wind turbines to operational status or for their removal from the Wind Park.

Vieren outlined, as "additional conditions" of the assignment with respect to "existing turbines," the time schedule set forth in section 7(b) of the January 1987 Agreement, 10/ stating that compliance with this schedule was

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10/ With respect to the various deadlines, Vieren stated:

"By April 30, 1987, to have underway a program to verify the condition of the wind turbine(s) and to begin testing on any options or alternatives for the repair and return to operational condition of the wind turbine(s).

"* * * By June 30, 1987 to have completed all evaluations of the wind turbine(s), including any proposed substantial repairs or retrofits.

"beyond the ability of the Grant Holder and must be immediately attended to by the individual wind turbine owners who wish to continue to maintain their wind turbine(s) within the Wind Park." Id. at 2. Vieren explained that authorized user agreements with Transworld had terminated upon assignment of the right-of-way grant to VieRam and, thus, "all turbine owners ceased to have any rights to use of the space within the Wind Park." 11/ Id. at 4. In order to reinstitute such right to use, Vieren required each WTG owner to execute and submit an enclosed "Authorized User Agreement" to Vieren by May 15, 1987, which agreement would incorporate the additional terms and conditions of the right-of-way grant regarding placing existing WTG's in operational status. The enclosed "Authorized User Agreement" specifically stated that VieRam conveyed to the user the nonpossessory, nonexclusive right to operate and maintain a WTG on an identified site within the Cabazon Wind Park right-of-way, "subject to the terms and conditions of the Grant." In addition, the agreement stated that it would be "effective only upon receipt of the prior written consent of the BLM." 12/ In addition to being required to submit an executed user agreement, Vieren stated that each WTG owner would be

> required to establish to the satisfaction of the Trustors and the Trustee that such turbine owner has the capability to comply with

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fn. 10 (continued)

"* * * By July 31, 1987 to have received bids from qualified contractors to perform work necessary to return the wind turbine(s) to operational condition.

"* * * By September 30, 1987 to have made final arrangements for either the return to service of the wind turbine(s) and have such work underway, or to remove from the Wind Park any wind turbine(s) which would not be returned to service. Final arrangements include obtaining all necessary consents from the Bureau of Land Management and the Grant Holder, the execution of binding contracts or other agreements for the performance of necessary work, and either the payment for work to be done or evidence that appropriate financing has been irrevocably arranged to pay for such work as it is done."

(April 1987) Letter at 2). There was no mention in the April 1987 Letter of the requirement to demonstrate by Sept. 30, 1987, that a test machine was "capable of delivering power output for 30 consecutive days equal to at least 75% of the power output measured against the Design Power Curve," as set forth in section 7(b) of the January 1987 Agreement at page 4.

11/ In a July 30, 1987, letter to Eldred, the Area Manager concurred in Vieren's conclusion regarding the effect of the transfer of the right-of-way grant to VieRam, stating that it "voided [Transworld's] authorized user agreements."

12/ In its April 1987 Letter, at page 6, Vieren stated that the enclosed "Authorized User Agreement" had been approved as to "form and content" by BLM. Indeed, by letter dated Apr. 10, 1987, the Area Manager specifically approved as to "form and content" a sample "Authorized User Agreement" submitted by Vieren. However, this approval apparently did not constitute the "prior written consent" of BLM. In an Aug. 3, 1987, letter to Ramsey, at page 1, Vieren stated that it had been informed by BLM that

> the terms and conditions of the Right-of-Way Grant as it applies to diligent development of the wind resource, and that such turbine owner has made appropriate plans to return his wind turbine to operational status and maintain such turbine.

Id. at 3. Accordingly, Vieren required WTG owners to submit a proposed plan for restoration of their WTG's to operating condition and confirmation of their financial ability by May 15, 1987. 13/ In the absence of the required submissions, Vieren stated that it would notify WTG owners that their rights to use space within the wind park were terminated as of January 15, 1987, and that, pursuant to the terms of the right-of-way grant, their property was presumed abandoned unless removed within 30 days from the date of termination. Upon submission of the required documents, Vieren stated that "if all is in order and acceptable to the Trustors and the Trustee," the executed "Authorized User Agreement" would be countersigned on behalf of VieRam. Id. at 6.

However, in a July 31, 1987, letter to Eldred, acting as President of the Windshark Owners Association (WSOA), 14/ at page 3, Vieren stated that it had chosen to renegotiate existing Authorized User Agreements, in accordance with the directive contained in the January 1987 decision of the Acting

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fn. 12 (continued)
"new user rights will not exist for anyone unless and until VieRam agrees to grant them * * * and the BLM concurs in each individual case, and * * * new Authorized User Agreements will not be signed by the BLM unless and until all of the timelines in the transfer have been satisfactorily met."
(Emphasis in original.)

13/ Vieren stated that the proposed plan

> "would include (i) the identity of the individuals or entities who will be doing the work; (ii) the estimated time of completion; (iii) confirmation that appropriate financial arrangements to complete any necessary repairs have been made; (iv) identification of the individual or entity who will be responsible for ongoing maintenance and operation of your turbine(s) once they are repaired; and (v) evidence from such individual or entity of their qualifications to perform these tasks, and that they have been retained by you for this purpose."

(April 1987 Letter at 6).

14/ The WSOA was formed as a result of a meeting held in Palm Springs, California, from Dec. 14 to 16, 1986, of the owners of "in excess of 200 of the approximately 320 Dynergy American Windshark [WTG's]" in the Cabazon and Maeva windparks (letter from Lantson E. Eldred, President, WSOA, to "Windshark Owner," dated Jan. 6, 1987, at 1). As originally envisioned, the purpose of the WSOA was to repair and return existing Windshark WTG's to operation, determine the feasibility and cost of retrofitting, maintaining, and operating the WTG's for long-term profitable use (20-30 years) and arranging for such retrofitting. Id. at 3-4. In his Jan. 6, 1987, letter, Eldred requested Windshark owners to indicate their participation in the WSOA by each submitting $ 3,000 no later than Jan. 20, 1987, in order to capitalize the association. Id. at 7.

District Manager approving the assignment of right-of-way CA-13198 to VieRam, and that the "renegotiation process [had] not been completed, and will not be completed as to any site until satisfactory compliance with the criteria of the last timeline in the Grant transfer, 30 September 1987." See also Amended Response of the Vieren Group, Inc., and the VieRam Trust (Amended Response), dated January 28, 1988, at 2, 3-4. Vieren explained in a September 28, 1987, memorandum to BLM, at page 1, that BLM and Vieren had agreed that Vieren would not execute any agreement "until it has been determined (via Paragraph 7, Grant Letter Attachment [January 1987 Agreement]) which turbine owners will remain at the wind park." A realty specialist with the Indio Resource Area Office explains the process agreed upon by BLM and Vieren in a January 14, 1988, statement filed with the Board on appeal:

> [A]ny rights that [the WTG owners] were to have in the wind park were to be earned through their proving to the Authorized Officer that their turbines could be operated on a regular and productive basis over the long term. Each successive step in the process was contingent on their satisfactory compliance with the previous step. The first step in the process was for the Users to file signed Authorized User Agreements with the VieRam Trust by a certain date. Any User not filing by that date lost his right to be considered an Authorized User under the Grant and was required to remove his turbine. Those Users successfully filing Agreements with the Trust were then allowed to participate in the test and retrofit program to prove the reliability of their turbines. Only after their turbines were approved as being reliable and thus approved for use in the wind park would their Authorized User Agreements be executed by the Trust and consented to by the Authorized Officer.

Exhibit 1 attached to BLM Response, dated January 15, 1988, at 21. See also BLM Response to Order Requesting Written Arguments on Stay and Motion to Dismiss Appeals (BLM Response to Order), dated December 18, 1987, at 8 n.6 (BLM "provided one last window of opportunity for existing authorized users to demonstrate the feasibility of their WTG's by requiring the VieRam Trust to enter into new authorized user agreements with the turbine owners who successfully completed the retrofit program outlined in the amended grant"). Finally, in an October 7, 1987, letter to WTG owners, following the Area Manager's October 1987 decision ordering removal of WTG's, at page 1, Vieren stated that "all applications submitted for Authorized User Agreements by Turbine Owners pursuant to the Grant assignment are herewith rendered null and void, and will not be executed by the Trust."

Prior to the Area Manager's October 6, 1987, decision at issue in this case, she had notified Vieren by letter dated July 28, 1987, of the necessity for securing "an unbiased third party engineer's report on the reliability of the retrofits since her office did not have the "engineering expertise" to evaluate the retrofit reports.

Thereafter, Vieren notified the Area Manager by letter dated August 20, 1987, that it had retained Gerald Lehmer Associates (GLA) to evaluate the feasibility of proposed retrofits in the Cabazon Wind Park. Attached to that letter was an agreement between Vieren and GLA, fully executed as of

August 20, 1987, in which GLA agreed to review and evaluate retrofit proposals for the Storm Master and Windshark WTG's. The agreement stated that GLA would evaluate the feasibility of the proposed retrofits as they were submitted and would make no suggestions or recommendations as to any design improvements. The agreement concluded, at page 12, that GLA's "sole character" was "to measure the proposals submitted against standard acceptable engineering practices and criteria in use today, and render our opinion as to feasibility for long term (up to 10 years) safe production of 75 percent of the Design Power Curve output with reasonable maintenance."

By letter dated August 26, 1987, Eldred inquired of Vieren as to when the review by GLA would be completed in order that WTG owners would know whether they would have sufficient time to comply with the September 30, 1987, deadline for making firm contractual arrangements to retrofit existing WTG's. Vieren replied by letter dated September 2, 1987, that GLA was expected to complete its review by September 9, 1987.

The conclusions of GLA regarding the feasibility of the proposed retrofits for the Windshark and Storm Master WTG's are contained in a seven-page letter, dated September 8, 1987, (hereinafter referred to as the GLA Report) from Gerald D. Lehmer to Vieren. Copies of the GLA Report were provided to the Area Manager by Vieren along with a September 12, 1987, cover letter. The GLA Report evaluated three "proposals" for retrofitting Windshark WTG's and three for retrofitting Storm Master WTG's (GLA Report at 1). In the case of the Storm Master WTG's, Lehmer concluded that each of the three "proposals" was considered "not feasible" primarily due to the failure to submit original design and redesign drawings and design and testing data, as well as the failure to address certain identified design problems. Id. at 2, 3. In the case of the Windshark WTG's, Lehmer concluded that each of the three "proposals" was considered "not feasible" primarily due to failure to address certain identified design problems or to submit design or testing data. Id. at 4, 5, 6. In general, Lehmer concluded that the retrofit proposals were "trial and error approaches [which were] * * * virtually untested, non-engineered and have no back-up documentation (drawings) and calculations as a basis for evaluation." Id. at 7.

By letter dated September 15, 1987, Vieren notified WTG owners that, pending review of the GLA Report by BLM and Vieren, the September 30, 1987, deadline for "having all contracts and financing in place" was extended to October 30, 1987. Vieren stated that no removals would be ordered before that date should none of the proposed retrofits be found acceptable. In its September 28, 1987, memorandum to BLM, Vieren stated that BLM concurred in the extension.

In her October 6, 1987, decision directed to Vieren as agent for VieRam, the Area Manager, noting that paragraph 7(b)(2) of the January 1987 Agreement, incorporated into the assignment of the right-of-way grant, had required a formal test report demonstrating the positive feasibility for a repair and modification program and that the GLA Report had found that none of the retrofit proposals met the criteria of "positive feasibility for long-term productivity," ordered the removal of all existing WTG's. Specifically, the Area Manager stated that: "[I]n accordance with the terms and

conditions of Right-of-Way Grant CA-13198, as assigned on January 15, 1987 (paragraph 7c(1)), you are hereby directed to remove or have removed all those wind turbines presently located at the subject site on or before but not later than midnight December 1, 1987." She also concluded that WTG owners who had not submitted either a retrofit proposal or an application for an authorized user agreement were "not in compliance with the amended right-of-way grant" and, therefore, were also required to remove their WTG's on or before midnight December 1, 1987. In the absence of timely removal, the Area Manager stated that the WTG's "shall become the property of the United States and the holder will continue to be liable for the cost of removal of the structures and for restoration of the site."

By letter dated October 7, 1987, Vieren notified WTG owners of the Area Manager's October 1987 removal order. The record contains no evidence of when the WTG owners received Vieren's October 7, 1987, letter and an attached copy of the Area Manager's October 1987 removal order.

On October 15, 1987, Miles L. Kavaller, owner of a Storm Master WTG at the Cabazon Wind Park, requested the Area Manager to extend the deadline for removal of WTG's for 90 days in order that, through SDTG, he could respond to the GLA Report and demonstrate the feasibility of his retrofitted WTG. 15/ Likewise, on October 22, 1987, Arthur Jacobson, owner of two Storm Master WTG's at the Cabazon Wind Park, requested the Area Manager to reconsider her removal order. By letters dated October 23, 1987, the Acting Area Manager notified Kavaller and Jacobson that the removal deadline would not be extended where there had been a failure to meet the "compliance, rehabilitation, and construction schedules" set forth in the January 1987 Agreement.

On November 5, 1987, Vieren provided the Area Manager with copies of letters to Vieren from John McKinney and Clyde A. Randolph, dated October 25, 1987, which objected to the Area Manager's removal order and requested Vieren's assistance in working out a method with BLM to demonstrate the feasibility of retrofitted Storm Master WTG's, and Vieren's responses thereto. There is no evidence that the Area Manager responded directly to McKinney and Randolph.

By letter dated November 10, 1987, addressed to the District Manager and received on November 12, 1987, 20 owners of Storm Master WTG's in the Cabazon Wind Park protested the Area Manager's October 1987 removal order. These same Storm Master owners prepared a notice of appeal to the Board from the removal order on November 10, 1987, which notice was filed with the Board on November 24, 1987. 16/ In that notice, the Storm Master owners

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15/ The record indicates that SDTG responded to the GLA report in an Oct. 14, 1987, report of Salter.

16/ The Storm Master owners on whose behalf the protest was filed were identified in the Nov. 10, 1987, notice of appeal as James Barnes, Steven T. Hwang, Gordon and Sue Tilbury, Arthur L. Jacobson, Jr., John J. Grana, Harold Musgrove, Hugh Davis, John Haines, Ed Nash, Joe Crunkleton, John McKinney, Gerald Higashi, Richard Hess, Einer Miller, Harlan D. Frank, Dennis Barbarics, Carl Selin, Lawrence Y. Lee, and Ed Salter. In a Feb. 9, 1988, letter to counsel for the Storm Master owners, the District Manager

requested a hearing in order to demonstrate the "operational feasibility" of the retrofitted Storm Master WTG's. On November 10, 1987, the Storm Master owners had also filed with the Indio Resource Area Office a request for a stay of the removal order pending a hearing before the Board. A similar request was filed with the Board on November 24, 1987.

By letter dated November 4, 1987, addressed to the District Manager and received on November 5, 1987, the WSOA, on behalf of its members who own Windshark WTG's at the Cabazon Wind Park (116 owners), protested the Area Manager's October 1987 removal order and requested a stay of that order pending administrative review. 17/ Subsequently, by letter dated November 23, 1987, directed to the Secretary of the Interior and received on November 24, 1987, the WSOA, again on behalf of its members who own Windshark WTG's at the Cabazon Wind Park, made an emergency request for a stay of the Area Manager's October 1987 removal order pending administrative review. A copy of the emergency request for a stay was received by the Board on November 25, 1987.

By order dated November 27, 1987, the Board, over the objections of Vieren, 18/ temporarily suspended the Area Manager's October 1987 removal order for an indefinite term and afforded the parties an opportunity to file briefs no later than December 21, 1987, on the question of whether the stay should be extended until the Board finally resolved the appeals.

Written briefs were filed in response to the Board's November 1987 order by the WSOA, the Storm Master owners, 19/ Kavaller, McKinney and

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fn. 16 (continued)
stated that the owners' November 1987 protest had been treated as an appeal because it was "not filed before the issuance of our final decision."

17/ In a Dec. 18, 1987, letter to the chief counsel for the Board, the Area Manager stated that she had informed counsel for the WSOA on Nov. 19, 1987, that BLM was treating the November 1987 protest of the WSOA as an appeal. In a notice of appeal filed with the California Desert District Office on Dec. 18, 1987, counsel for the WSOA stated that he interpreted the Nov. 19, 1987, communication as a denial of the WSOA's protest and was, therefore, filing a protective appeal from that decision.

18/ Vieren's objections were contained in a Nov. 23, 1987, letter to the Board, received Nov. 24, 1987, and other attached documents. Included with the other documents was a cover letter dated Nov. 21, 1987, addressed to the Secretary of the Interior. In that letter, Vieren requested denial of a request for a stay filed by Kavaller and "any other request for such a stay" because of the adverse financial consequences to Vieren of granting a stay. On Nov. 23, 1987, Kavaller had filed with the Secretary a Nov. 16, 1987, request for a stay of the Area Manager's October 1987 removal order pending the District Manager's review of Kavaller's Nov. 16, 1987, request for reconsideration of that order and any subsequent administrative review. Vieren had opposed Kavaller's request for reconsideration in a Nov. 21, 1987, letter to the District Manager.

19/ On Dec. 24, 1987, the Storm Masters owners sought to augment the list of those parties appealing the Area Manager's October 1987 removal order to

Randolph, Vieren, and BLM. By order dated December 30, 1987, the Board stayed the Area Manager's October 1987 removal order pending a final decision by the Board on the merits of that order and granted expedited consideration of the pending appeals. The decision reached by the Board herein constitutes the Board's final resolution of the present controversy.

Procedural Issue

[1] Before resolving the substantive issues raised by this case, we must first address a significant procedural matter, viz., the standing of the parties to bring their respective appeals. 20/ Both BLM and Vieren, on behalf of VieRam, challenge the standing of the Storm Master owners, presumably including McKinney and Randolph and Kavaller, and the WSOA, which is appealing on behalf of its members who own Windshark WTG's at the Cabazon Wind Park, 21/ to appeal the Area Manager's October 1987 removal order, and request dismissal of all of the appeals.

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fn. 19 (continued)
include the names of George Lofink, Elton Howard, Leonard Marks, D'Wayne Scott and "[o]ther Storm Master Owners." These other owners were subsequently identified as Dibar Energy, LSH Energy, Partners, Willard Miller, Clyde Randolph, Lawrence Strong, and Bob McAlmond. Counsel for the Storm Master owners stated that these parties had not been included in the original appeal "because no attorney/client relationship existed at that time." In response thereto, BLM contends that the appeal of these individuals should be dismissed as untimely where the 30-day time period for appealing the Area Manager's October 1987 removal order "ran out in mid-November 1987" (BLM Response at 9-10). Jurisdiction of the Board is dependent on the filing of a notice of appeal within 30 days "after the date of service" of the decision being appealed. 43 CFR 4.411(a); see, e.g., Lyman J. Ipsen, 96 IBLA 398 (1987). However, in the present case, it is not at all clear when the named individuals were either served with a copy of the Area Manager's October 1987 removal order or received notice thereof. Therefore, we decline to dismiss the appeal of those individuals as untimely. Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (1986).

20/ The record indicates that attempts were made by both the WSOA and the Storm Master owners to get VieRam to appeal the Area Manager's October 1987 removal order. Requests that VieRam initiate an appeal in fulfillment of its "fiduciary relationship" with WTG owners at the Cabazon Wind Park were made by letter dated Oct. 29, 1987 (WSOA), and Nov. 13, 1987 (Storm Master owners). In a Nov. 5, 1987, letter to WSOA, VieRam took the position that it had no fiduciary relationship with WTG owners where authorized user agreements had terminated with the transfer of the right-of-way to VieRam and new agreements had never been executed.

21/ WSOA has never identified the particular parties which it purports to represent in appealing the Area Manager's October 1987 removal order. Rather, it simply says that it represents "its members who own American Windshark [WTG's] in the Cabazon Wind Park pursuant to Authorized User Agreements" (Protest, and Request for Stay and Review of Area Manager's Initial Determination and Removal Order (Protest), dated Nov. 4, 1987, at 1). Vieren has provided the Board with a map of the Cabazon Wind Park

The Departmental requirement of standing to appeal to the Board is set forth in 43 CFR 4.410, which outlines two discrete requirements, viz., that the appellant is a "party to the case" and that the appellant is "adversely affected" by the decision appealed from. Kenneth W. Bosley, 102 IBLA 235, 236 (1988); Oregon Natural Resources Council, 78 IBLA 124, 125 (1983). The requirement that the appellant be adversely affected by the decision appealed from has been interpreted by the Board to require that a legally cognizable interest of the appellant be adversely affected. Id. Such interest must be more than that of a mere trespasser who has made improvements on public land "without color or claim of right." James M. Wright, 95 IBLA 387, 389 (1987). However, it is not necessary that an appellant have an interest "in the land" which is adversely affected in order to be accorded standing to appeal a BLM decision. In re Pacific Coast Molybdenum Co., 68 IBLA 325, 333 (1982). Thus, an appellant may properly base a claim of standing upon the mere lawful use of public land. Id. at 332-34; see also National Wildlife Federation, 82 IBLA 303, 308 (1984); Desert Survivors, 80 IBLA 111, 113 (1984). Moreover, the interest which is asserted to be adversely affected by a BLM action may proceed from a color or claim of right as to public land and need not ultimately be determined to be valid where "the existence of standing cannot be made dependent upon ultimate substantive success on appeal." California State Lands Commission, 58 IBLA 213, 217 (1981).

In the present case, appellants assert that they are the owners of WTG's situated on the Cabazon Wind Park right-of-way. BLM and Vieren do not dispute this assertion. Rather, Vieren argues that appellants do not have standing to appeal to the extent that BLM has not consented to their use of the right-of-way, pursuant to 43 CFR 2801.1-1(f). That regulation provides in relevant part that the holder of a right-of-way grant "may authorize other parties to use a facility constructed * * * on the right-of-way with the prior written consent of the authorized officer." 43 CFR 2801.1-1(f). BLM, likewise, concludes that owners of WTG's situated on the right-of-way without the prior written consent of BLM do not have a legally cognizable interest which has been adversely affected, but, rather, are in the nature of trespassers. However, BLM also argues that even prior written consent by BLM pursuant to 43 CFR 2801.1-1(f) does not confer the necessary legally

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fn. 21 (continued)
which indicates all of the WTG sites; the types of WTG's erected or to be erected on the sites; the respective owners and, in the case of Windshark WTG sites, whether the owners are members of the WSOA; and whether a foundation and a complete WTG has been placed on each site. The map indicates that the information is as of Sept. 29, 1987, on which date the wind park was inspected by representatives of Vieren and photographs taken of each WTG site. This inspection followed an Aug. 1, 1987, inspection by representatives of BLM and Vieren which disclosed that, of the 429 approved WTG sites, 118 had complete turbines (84 Windshark, 30 Storm Master, and 4 Wenco), 114 had partially completed turbines, and 52 had only foundations (Exh. 28 attached to BLM Response to Order). We presume that WSOA's appeal is on behalf of those members who purport to have entered into authorized user agreements with a prior right-of-way grant holder with respect to a particular WTG site at the Cabazon Wind Park and have either erected a complete or partially completed WTG on their WTG site or plan to erect a WTG.

cognizable interest where authorized users have no interest in the right-of-way grant itself, i.e., where the user's rights are derived not from the grant but, rather, from private agreements with the right-of-way holder.

It is clear that any rights appellants had to construct and operate WTG's on the Cabazon Wind Park right-of-way stemmed from user agreements executed by appellants and the prior holder of the right-of-way grant, with BLM's prior written consent. BLM admits that certain of the Storm Master owners appealing herein are considered to be "authorized users" as of December 31, 1986, and, therefore, fall within the definition of "current users" in the January 1987 Agreement 22/ (BLM Response to Order at 16). However, BLM asserts that the remaining Storm Master owners and all of the Windshark owners appealing herein are not considered to be authorized users as of December 31, 1986.

The Storm Master owners have provided no evidence that authorized user agreements were ever executed by the remaining owners and the prior holder of the right-of-way grant with BLM's approval. These owners, thus, cannot be considered "authorized users" as of December 31, 1986, and, therefore, do not fall within the definition of "current users" in the January 1987 Agreement.

WSOA, however, contends that all of the Windshark owners appealing herein had executed authorized user agreements with Transworld but that BLM had not required that they be filed with BLM and had issued a blanket written consent for such agreements. 23/ In particular, WSOA notes that Eldred

22/ BLM indicates that all of the Storm Master owners appealing herein had authorized user agreements on file with BLM, with the exception of Gordon and Sue Tilbury, Joe Crunkleton, D'Wayne Scott, and Ed Salter (BLM Response to Order at 15). In addition, we can find no agreement on file for LSH Energy Partners or Lawrence Strong. The agreements contained in the record indicate that they were received on Oct. 2, 1984, and are authorizations by Transworld to use sites within the Cabazon Wind Park. The agreements are signed by the individuals but are not countersigned by Transworld. In addition, attached to each agreement is an unexecuted document entitled "Consent of the United States of America," which states that BLM "consents to the terms of 'Authorized User Agreements.'" WSOA has provided the Board with a copy of that consent from executed by the Acting District Manager on Nov. 9, 1984. See Exhibit 4 attached to Motion and Brief of Windshark Owners for Continuation of Temporary Stay Pending Conclusion of Administrative Appeals (WSOA Motion for Continuation of Stay), dated Dec. 17, 1987. In addition, McKinney and Randolph have submitted a copy of their authorized user agreement with Transworld, signed by a representative of Transworld and with an attached copy of the BLM-executed consent form.

23/ In its Reply of Windshark Owners to Responsive Pleadings Filed Pursuant to the Board's Suspension Order (WSOA Reply), dated Feb. 9, 1988, at page 24 n.52, WSOA states that it has obtained from Transworld copies of authorized user agreements with respect to 97 out of approximately 150 WTG sites at the Cabazon Wind Park and that it intends to obtain the balance of the agreements from the individual owners. WSOA offers these documents for

had, on behalf of Transworld, submitted a sample authorized user agreement to the Area Manager on September 17, 1984, and requested that the Area Manager approve the agreement in writing and indicate whether Transworld could use the agreement to authorize WTG sites on the Cabazon Wind Park without prior written consent by BLM in each instance. The record contains no written response by the Area Manager to Eldred's request. Nevertheless, WSOA notes that in an October 29, 1984, letter to Dynergy Systems, Eldred, referring to his September 1984 submission, stated that:

> I am requesting that the BLM execute one Consent Form in advance which would apply to all future sales of wind turbine generators within the park. Specific BLM consent for each sale will then not be required. Leslie [Cone, the Area Manager,] has indicated that this method would be acceptable to the Bureau and I expect to receive back the executed consent in the near future.

(Exhibit 5 attached to Response of Windshark Owners and Conditional Request for Hearing (WSOA Response/Request), dated January 12, 1988, at 2). WSOA asserts that the blanket consent to use of the sample authorized user agreement was subsequently contained in the Acting District Manager's November 9, 1984, execution of Transworld's consent form.

We find nothing in the language of 43 CFR 2801.1-1(f) which precludes BLM from providing a blanket prior written consent to the holder of a right-of-way grant to authorize use of facilities within the right-of-way. In the case of a wind park right-of-way where BLM approves a general plan of operations which defines the number of WTG sites authorized within the right-of-way and the types of WTG's which can be placed on those sites, blanket prior written consent by BLM to a right-of-way grant holder to assign the right to use those sites to particular individuals under terms and conditions already approved by BLM has an obvious administrative advantage. It is this advantage that WSOA maintains prompted the Area Manager to verbally agree to a blanket prior written consent:

> [A]t or about the time of the assignment of the Grant from Aztec to Transworld on October 15, 1984, Ms. Cone specifically advised Mr. Eldred that -- with respect to <u>future</u> users with whom Transworld would enter into Authorized User Agreements in conjunction with the sale of Dynergy WTG> * * * -- BLM <u>did</u> <u>not</u> <u>want</u> Transworld to submit for approval each of the individual turbine owners' agreements. Ms. Cone represented to Mr. Eldred that BLM did not want to have to review every owner's user agreement and approve

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fn. 23 (continued)
inspection by the Board. In a Feb. 11, 1988, declaration, Philip C. Cruver, President of IDI, states that Transworld had entered into agreements with "each purchaser" of a Windshark WTG, thereby authorizing the use of a site at the Cabazon Wind Park, and that BLM's consent "was at all times understood by Transworld to be a blanket consent authorizing use of spaces at Cabazon by all purchasers of Dynergy's Windshark WTG's, under Transworld's approved Plan of Operation" (Exh. 8 attached to WSOA Reply at 2).

> every user agreement respecting WTGs at Cabazon, because BLM had a small office and did not want to get involved in all of the paperwork. Moreover, Ms. Cone indicated that BLM did not really care who owned the turbines at each of the sites, provided the sites themselves (i.e., what equipment, and where) had been approved by BLM pursuant to BLM approval of Transworld's plan of operations. [Emphasis in original.]

(WSOA Response/Request at 7). However, as this case illustrates, there is the practical limitation that BLM consequently has no record of the individual user agreements and, thus, does not know who is authorized to use the right-of-way and when that authorization is issued. In such circumstances, BLM may be unable to properly monitor activities on the right-of-way.

The threshold question is whether Transworld had executed authorized user agreements with the Windshark owners appealing herein and whether BLM issued the blanket prior written consent for such agreements. Based on the evidence submitted by the WSOA, which is not sufficiently rebutted by BLM, we conclude that the Windshark owners must, likewise, be considered "authorized users" as of December 31, 1986, and, therefore, fall within the definition of "current users" in the January 1987 Agreement. 24/ All such

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24/ On appeal, BLM and Vieren challenge whether any authorized user agreements executed by Transworld and WTG owners can be considered valid where the agreements provided that they would be "void and of no effect" if not recorded in the official records of Riverside County and where BLM has determined that no agreements were ever recorded (Exh. 2 attached to BLM Response). Whether the lack of recordation served to invalidate any agreement was, we conclude, a matter between the parties to the agreement where recordation was not a prerequisite for BLM approval of the agreement. BLM and Vieren, thus, cannot raise the lack of recordation as a basis for asserting that WTG owners had not entered into valid authorized user agreements with Transworld.

BLM also challenges the assertion that it had issued a blanket prior written consent for authorized user agreements between WTG owners and Transworld. In a Dec. 17, 1987, declaration, the Area Manager admits that BLM "approved [Transworld's authorized user] agreements [submitted by Eldred] on Nov. 9, 1984," but stated that she thereafter proceeded on the "understanding that if and when [Transworld] sold individual turbines, it would complete authorized user agreements for each of them and submit the agreement to BLM for approval prior to construction" (Exh. 19 attached to BLM Response to Order, at 1, 2). There is no evidence that this "understanding" was ever communicated to Transworld such that it officially qualified the Acting District Manager's approval of Transworld's authorized user agreement.

BLM also refers to language in the sample authorized user agreement submitted by Eldred that it would be effective "only upon receipt of prior written consent of the BLM" (Exh. 4 attached to BLM Response to Order, at 4 (cited in BLM Supplemental Response, dated Feb. 9, 1988, at 3)). However, this language does not establish that the Acting District Manager's Nov. 9, 1984, unqualified execution of the consent form attached to the sample agreement did not constitute blanket prior written consent for the use of

"current users" will be considered to be parties with "existing Authorized User Agreements" at the time of the assignment to VieRam, under the District Manager's January 1987 decision approving that assignment, where there is no evidence that Transworld's authorized user agreements were terminated between December 31, 1986, and the date of the assignment.

BLM and Vieren contend that even if appellants are deemed to be authorized users at the time of the January 1987 assignment to VieRam, that assignment extinguished whatever rights they had under existing authorized user agreements with Transworld. No legal authority is cited for the proposition that users' rights automatically terminated on the occasion of the assignment of the right-of-way to VieRam. Whether, as a general rule, users' rights are terminated when a right-of-grant is assigned to a new holder need not be decided in this case. Here, the District Manager's January 1987 decision approving the assignment to VieRam stated that existing authorized user agreements "shall be assigned to, or be renegotiated by VieRam Trust." Moreover, arguably incorporated into the right-of-way grant by the District Manager's January 1987 decision was that part of the January 1987 Agreement in which VieRam agreed to execute authorized user agreements with all "current users" under certain terms and conditions. Thus, by virtue of the District Manager's January 1987 decision, Storm Master and Windshark owners who had "existing Authorized User Agreements" and fell within the definition of "current users" apparently had a right to enter into new authorized user agreements with VieRam so long as the right-of-way grant remained in existence, conditioned only on their acceptance of the required terms and conditions and execution of the agreements.

Vieren took the position sometime after assignment of the right-of-way grant that "current users" were also required to comply with the retrofit program requirements set forth in section 7(b) of the January 1987 Agreement prior to VieRam's execution of new authorized user agreements. However, no such requirement is contained in the January 1987 Agreement. Rather, VieRam was required by the January 1987 Agreement to enter into new authorized user agreements which "provided that as an additional condition thereto, all of the Current Users will be required to further agree" to the retrofit program requirements. 25/

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fn. 24 (continued)
that agreement. Likewise, the Acting District Manager's separate approval of a Dec. 22, 1984, authorized user agreement between IDI and Koch Wind Turbine, Ltd. (Exh. 22 attached to BLM Response to Order, at 22 (cited in BLM Supplemental Response, at 3)), which agreement differed significantly from the sample agreement submitted by Eldred, fails to establish that the Acting District Manager's Nov. 9, 1984, execution of the consent form attached to the sample agreement was not intended to provide blanket prior written consent for the use of the sample agreement. In the end, what is most persuasive that the Acting District Manager's Nov. 9, 1984, execution of the consent form constituted blanket prior written consent for all of Transworld's authorized user agreements is the fact that BLM has provided no evidence that such approval was limited to the Storm Master owners' agreements contained in the record, which were themselves not individually approved.

25/ BLM has also taken the position that compliance with the retrofit program requirements was a prerequisite to VieRam's execution of new authorized

We therefore conclude that an authorized user agreement with Transworld in existence at the time of the January 1987 assignment to VieRam and the subsequent conditional right, enforceable by BLM, to a new authorized user agreement with VieRam is a sufficient legally cognizable interest upon which to base a claim of standing by applicable appellants to appeal the Area Manager's October 1987 removal order. Cf. Rube W. Evans, 26 IBLA 15 (1976) (assignee of grazing lease conditionally approved by BLM has standing). These appellants cannot be considered mere trespassers on the public land "without color or claim of right." James M. Wright, supra at 389. Rather, these appellants have a claim of right to the use of WTG sites at the Cabazon Wind Park based upon the District Manager's requirement, in his January 1987 decision approving the assignment, that VieRam execute new authorized user agreements with such parties. That claim of right to use the facilities on the right-of-way, subject to enforcement by BLM, is a legally cognizable interest. It is not necessary that these appellants have an interest in the right-of-way grant itself in order to have a legally cognizable interest where lawful use of and, certainly, a claim of right to use public land is sufficient. See Klas, Inc., 101 IBLA 206, 208-10 (1988); City of Tanana, 98 IBLA 378, 380 (1987) (claim of right to use right-of-way sufficient claim of property interest for standing under 43 CFR 4.410(b)); Penroc Oil Corp., 84 IBLA 36, 38 (1984) (operator of oil and gas lease has standing to challenge BLM issuance of right-of-way to dispose of saltwater in lease well). Standing to object to BLM actions is not limited solely to those who have entered into a formal relationship with BLM by way of lease, contract, right-of-way grant or otherwise. 26/ See State of Alaska, 85 IBLA 196, 200

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fn. 25 (continued)
user agreements. BLM contends that the "Bureau conditionally required the holder, upon the users' compliance with the terms of Paragraph 6 and 7 of Exhibit A to the grant, to negotiate new authorized user agreements with all existing authorized users" (BLM Response to Order, at 11). Whatever merit BLM's contention has regarding the condition for negotiation of new agreements, it indicates that, in approving the assignment of the right-of-way grant, BLM had, in fact, "conditionally required" VieRam to negotiate and execute new agreements.

26/ BLM is generally concerned that according standing to authorized users under right-of-way grants, rather than limiting standing to grant holders, will lead to an administrative nightmare: "[T]he Bureau could potentially be forced to negotiate with thousands of individual entities, to serve its decisions on thousands of users and to face potential appeals of its management decisions by thousands of users, rendering virtually impossible coherent management of the grants" (BLM Response at 6). In according standing to certain appellants herein, we are not suggesting that BLM should have negotiated with such parties. During the term of a right-of-way grant, BLM need only deal with the grant holder. See 43 CFR 2801.1-1(f); Tenneco Oil Co., 63 IBLA 339, 341 (1982). However, should BLM take action adverse to authorized users, such decisions are subject to appeal as earlier explained. Inasmuch as an appeal from a BLM decision concerning a right-of-way does not suspend the effectiveness of that decision, absent the imposition of a stay (43 CFR 2804.1(b)), appeals by authorized users should not unduly interfere with coherent management of right-of-way grants (cf., right of persons who

(1985) (state selection application); Bureau of Land Management v. Maez, 67 IBLA 89, 94 (1982) (application for grazing lease); Geosearch, Inc., 64 IBLA 149, 151 (1982) (assignee of oil and gas lease offers); Tenneco Oil Co., supra at 341 (unapproved assignee of oil and gas lease); George Jalbert, 39 IBLA 205 (1979) (adjacent landowners); United Park City Mines Co., 33 IBLA 358, 359 (1978) (application for public sale); City of Klawock v. Andrew, 24 IBLA 85, 88, 83 I.D. 47, 49-50 (1976), aff'd, City of Klawock v. Gustafson, No. K 74-2 (D. Alaska Nov. 11, 1976) (application for townsite deeds); Crooks Creek Commune, 10 IBLA 243, 246 (1973) (adjacent landowners); James W. McDade, 3 IBLA 226, 229 (1971), aff'd, McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974)) (oil and gas lease offer). Finally, appellants' interest will not be regarded as any less of a legally cognizable interest where its validity has not been finally determined by BLM or the Board.

Appellants' claim of right to use facilities constructed on the right-of-way was adversely affected by the Area Manager's October 1987 order to remove such facilities. BLM, however, argues that appellants cannot be considered "parties to the case" where they did not protest the removal order (BLM Response to Order at 17). Aside from the obvious fact that appellants had no notice that BLM proposed to order removal of WTG's prior to issuance of the October 1987 order, the filing of a protest is necessary to make a party a "party to a case" under 43 CFR 4.410(a) only where that party has had no prior involvement in the case and, thus, BLM has not had an opportunity to consider the concerns of the party regarding the action taken. California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). In the present situation, BLM was well aware that holders of the Cabazon Wind Park right-of-way grant had authorized its use by third party WTG owners and that WTG's had been constructed on many sites. The Area Manager was, thus, in a position to know what the effect of her removal order would be on these owners and could anticipate their concerns. It is simply incongruous to say that the subject appellants are not "parties to the case." See Utah Wilderness Association, 91 IBLA 124 (1986). We, thus, conclude that those appellants who had authorized user agreements with Transworld in existence at the time of the January 1987 assignment to VieRam have standing to appeal the Area Manager's October 1987 removal order. 27/

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fn. 26 (continued)
use and enjoy BLM forest lands to appeal from timber sale decisions though they are not parties to the contract. Such decisionmaking is also, by regulation, not automatically suspended on account of appeals therefrom. 43 CFR 5023.1.)

27/ While we hold that certain appellants have standing in the present case, we recognize that there may be a situation in which third-party users have no standing because there is no remedy available. As the court stated in Geosearch, Inc. v. Andrus, 508 F. Supp. 839, 845 (D. Wyo. 1981): "In order to have standing, Geosearch must prove that it has an injury in fact that is likely to be redressed by a favorable decision of the court." Thus, where BLM terminates a right-of-way grant for noncompliance by the holder with a term or condition of the grant or the holder relinquishes the grant, a third-party user would have no remedy with BLM. It might, however, pursue an action against the holder in a court of competent jurisdiction.

However, we cannot conclude that the remaining appellants have legally cognizable interest upon which they may base a claim of standing. At best, these appellants have an interest which is embodied in an authorized user agreement prepared by Vieren, approved as to form and content by BLM, and purportedly filed by each of the appellants with Vieren with respect to certain WTG sites. Such agreements remain to be executed by VieRam. While, in the absence of the removal order, VieRam would be free to execute these agreements, such appellants have only a mere hope or expectancy that VieRam will execute the agreements. Unlike the other appellants, they have no claim of right to execution of the agreements and subsequent use of right-of-way facilities. These appellants do not have standing to appeal the Area Manager's October 1987 removal order.

Accordingly, we hereby dismiss the appeals of those appellants who did not have authorized user agreements in existence on the date of the assignment of right-of-way CA-13198 from Transworld to VieRam and deny BLM's and Vieren's requests to dismiss the remaining appeals.

Substantive Issues

The Area Manager's October 1987 removal order purports to be based on a failure by the right-of-way grant holder to comply with the terms of the right-of-way grant as it was assigned to VieRam, i.e., incorporating the retrofit program requirements set forth in the January 1987 Agreement and specifically the requirements in sections 7(b)(2) and 7(b)(4)(c) to submit a test report for each test machine demonstrating "positive feasibility for a repair and modification program" and to demonstrate that each test machine has certain productive capability.

We find that despite various questions which arise regarding who was required to comply with the retrofit program requirements of the January 1987 Agreement, it is clear from 43 CFR 2801.1-1(f) that VieRam, as the holder of the right-of-way, remained ultimately responsible for compliance.

[2] To the question of whether the Area Manager properly determined, in her October 1987 removal order, that the reports submitted to GLA had not demonstrated a "positive feasibility for a repair and modification program" an adequate productive capability, as required by sections 7(b)(2) and 7(b)(4)(c) of the January 1987 Agreement, we note the following. In ordering removal of the WTG's, the Area Manager relied on the fact that GLA had concluded that "none of the retrofit report proposals submitted meet the criteria of positive feasibility for long-term productivity." (Emphasis added.) In his September 8, 1987, letter to Vieren, at page 1, Lehmer stated that GLA had "rendered our opinion as to the feasibility for long term (up to 10 years) safe production of 75 % of the Design Power Curve output with reasonable maintenance." BLM's reliance on the GLA conclusion was improper for a number of reasons. First, section 7(b)(4)(c) of the January 1987 Agreement only required a "[d]emonstration" that a test machine was capable of "delivering power output for 30 consecutive days equal to at least 75 % of the power output measured against the Design Power Curve" by September 30, 1987. There is no suggestion that the earlier requirement in section 7(b)(2) of the January 1987 Agreement to submit a test report setting

forth a "positive feasibility" by June 30, 1987, required a showing of capability for power output at 75 percent of the Design Power Curve. Accordingly, we regard GLA's September 8, 1987, conclusion as premature since "current users" had until September 30, 1987, to demonstrate 30-day power output capability.

Second, even if we presume that the Area Manager also relied on the fact that no additional information was submitted between September 8 and 30, 1987, we note that the GLA analysis was flawed for the following reasons: (1) it required a demonstration of up to 10 years capability rather than a 30-day capability, as set forth in the January 1987 Agreement; (2) it was unclear whether 75 percent productive capability was to be demonstrated each day or as an average over 30 days; and (3) the term "Design Power Curve" did not indicate whether it referred to the theoretical or actual design capability of the original WTG's. Thus, the Area Manager could not properly rely on the GLA analysis, and, accordingly, could not properly order the removal of any WTG's pursuant to section 7(c)(1) of the January 1987 Agreement, based on that analysis.

BLM has also maintained on appeal that the Area Manager's October 1987 removal order was not based solely on the GLA report but that other factors entered into that order, chief among which was the fact that there were no warranties, guarantees, or factory support for the retrofitted WTG's. These factors, however, were not mentioned in the removal order, and there was nothing in section 7(b) of the January 1987 Agreement which required any demonstration regarding warranties, guarantees, or factory support. These "other factors" do not support the action taken. 28/

28/ Even assuming there had been a violation of the right-of-way grant as it was assigned, the grant itself provided initially for a notice of noncompliance followed by a 30-day period to comply and then either suspension or termination of the grant. See also 43 CFR 2803.4(d). There was no mention of removal of structures except following termination of the grant. See 43 CFR 2803.4-1. Rather, the Area Manager purports to find authority for her October 1987 removal order in section 7(c)(1) of the January 1987 Agreement. However, section 7(c) as a whole provides that "current users" have the option, in the event a test report indicates a negative feasibility "for a particular type WTG," of either removing the WTG where it does not meet the performance criteria in section 7(b)(4)(c) and contracting, with the approval of BLM and VieRam, for the erection of a new WTG or offering the right to purchase the use of the applicable WTG to VieRam (see Declaration of Marc P. Schoonmaker, dated Jan. 27, 1988, at 2-3). To the extent that BLM had incorporated the test report requirement in the right-of-way grant as it was assigned, BLM must be deemed to have also incorporated the entire provision applicable where a test report was found to indicate negative feasibility. As such, if the Area Manager determined that the "test reports" provided to GLA indicated negative feasibility for the retrofitted WTG's, she was bound, in the absence of termination of the right-of-way grant, to order VieRam to require "current users" to exercise their option to either remove the WTG's which did not meet performance criteria or offer VieRam the right to purchase the use of the WTG'.

In conclusion, we hold the decision appealed from must be vacated because there was not sufficient evidence for BLM to conclude that the right-of-way holder failed to demonstrate long-term productivity of wind turbines located on the right-of-way. The removal order was therefore improperly issued. Upon return of the case, BLM may, of course, take whatever other action it considers appropriate in administration of the right-of-way, including monitoring and enforcement of the diligent development provisions of the right-of-way grant as appropriate.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed in part and the decision appealed from is vacated and the case remanded.

Wm. Philip Horton
Chief Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

IBLA 88-91 103 IBLA 162 (1988)	:	CA-13198
STORM MASTER OWNERS ET AL.	:	Right-of-Way
	:	Petition for Reconsideration Granted; Board Decision Modified; Submission of Authorized User Agreements Required

ORDER

The Bureau of Land Management (BLM) has petitioned for reconsideration of the Board's July 21, 1988, decision in Storm Master Owners, 103 IBLA 162 (1988), in which we vacated an October 6, 1987, decision of the BLM Area Manager, Indio Resource Area Office, California, ordering the removal of all wind turbine generators (WTG's) from a right-of-way for the Cabazon Wind Park, CA-13198.

The subject right-of-way, which authorized the use of certain Federal lands in the Cabazon Valley for the construction, operation, and maintenance of WTG's, was originally issued by BLM on December 8, 1982. The current holder of the right-of-way grant is the VieRam Trust (VieRam). Prior to BLM's January 15, 1987, approval of the assignment of the right-of-way grant from Transworld Wind Corporation (TransWorld), VieRam's immediate predecessor-in-interest, to VieRam, Transworld has entered into agreements with various parties authorizing their use of the Cabazon Wind Park for construction, operation, and maintenance of individual WTG's, consistent the transfer of the right-of-way grant. As conditions of its approval of the transfer of the right-of-way grant to VieRam, BLM required that "[a]ny and all existing Authorized User Agreements issued by VieRam Trust," and stated that VieRam was bound to comply with certain requirements for demonstrating the long-term viability of retrofitted WTG's.

In her October 1987 decision, the Area Manager ordered the removal of all existing WTG's, which were in various stages of construction, from the Cabazon Wind Park right-of-way, based on her determination that the right-of-way holder had failed to demonstrate the long-term viability of retrofitted WTG's. The Area Manager's October 1987 decision was appealed to the Board by two associations of WTG's owners, the Storm Master Owners, composed of 30 individuals or entities who own Storm Master WTG's, and the Windshark Owners Association (WSOA), composed of a number of unnamed individuals or entities who own Windshark WTG's, and three individual WTG owners, Miles L. Kavaller, John A. McKinney, and Clyde A. Randolph.

The initial question raised before the Board by BLM and the Vieren Group, Inc. (Vieren), the authorized representative of Vie Ram, was whether any of the appellants had standing to appeal the Area Manager's October 1987 decision. We concluded in our July 1988 decision that all WTG owners who had entered into authorized user agreements, approved by BLM, with Transworld as of the time of BLM's January 1987 approval of the assignment to VieRam had standing to appeal based on a "conditional right, enforceable by BLM, to a new authorized user agreement with VieRam," even though they would generally be considered third parties to the right-of-way grant. Storm Master Owners, supra at 182.

We next turned to the question of the propriety of the Area Manager's October 1987 decision ordering removal of all WTG's, concluding that the order was improper where BLM did not have sufficient evidence to conclude that the right-of-way holder had failed to demonstrate the long-term viability of retrofitted WTG's. Accordingly, we vacated the Area Manager's October 1987 decision and remanded the case to BLM for further appropriate action.

On August 5, 1988, BLM pursuant to 43 CFR 4.403, filed a petition for reconsideration of the Board's July 1988 decision in Storm Master Owners. The WSOA, through counsel, filed a response to BLM's petition on September 7, 1988. BLM replied to this response on September 16, 1988. 1/

In its petition, BLM does not request reconsideration of the Board's conclusion that WTG owners who had entered into authorized user agreements, approved by BLM, with Transworld as of the time of BLM approval of the assignment to Vie Ram had a sufficient legally cognizable interest upon which to base standing. 2/ Nor does BLM challenge resolution of the substantive issue in Storm Masters Owners. Rather, BLM asks the Board to reconsider its holding its members of the WSOA had, in fact, entered into authorized user agreements with Transworld. BLM alleges, that there is an absence of positive evidence supporting that conclusion in the record. BLM specifically requests the Board to order the WSOA to submit on behalf of its members

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1/ On Sept. 21, 1988, the Board received a Petition for Reconsideration filed by Vieren Group, Inc., through counsel. That petition was dismissed as untimely by separate order on this same date.

2/ It is clear from BLM's petition that it regards the Board's original decision as holding that "any authorized user has standing to challenge through appeal adverse decision issued to the right-of-way holder."
(Petition for Reconsideration at 3 n.1 (emphasis added.)). That was not, however, our holding. The Board's conclusion regarding standing should had expressly required continuation of authorized user status for certain WTG owners as a condition of approval of the assignment to VieRam. Beyond that, we express no opinion on whether on whether and under what circumstances, if any, future authorized users might have standing to appeal BLM actions taken against a right-of-way holder.

copies of executed authorized user agreements with Transworld in order to establish their standing to appeal the Area Manager's October 1987 decision; failing this, BLM contends, the Board should regard such WTG owners as not having standing and therefore not entitled to the benefit of the Board's vacation of the Area Managers' decision.

BLM argues that such members should not be considered to have had standing to appeal where they have not submitted copies of executed authorized user agreements with Transworld in existence at the time of BLM approval of the assignment to VieRam. As noted supra, such agreements formed the basis for our determination of standing. We initially relied on the absence of adequate refutation by BLM of the existence of such agreements. See Storm Masters Owners, supra at 180.

WSOA has responded to BLM's petition arguing that it should be denied because "the relief requested is unnecessary." WSOA Response at 1. The basis for this conclusion by WSOA is its contention that it is in possession of all the user agreements executed by and between Transworld and the Windshark and that it stands ready, willing, and able to present those documents to BLM and "to discuss overall plans for rejuvenation of the troubled Cabazon Wind Park." Id.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's petition for reconsideration is granted; the Board's decision in Storm Master Owners

is modified as set forth supra; and submission to BLM of the necessary authorized user agreements is directed.

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Wm. Philip Horton
Chief Administrative Judge

We concur:

_____
C. Randall Grant, Jr.
Administrative Judge

_____
Bruce R. Harris
Administrative Judge

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